

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

DANNY B. CHILDERS

PLAINTIFF

V.

CIVIL ACTION NO. 1:05CV164-SAA

FREDS, INC.; AND
K MART CORPORATION

DEFENDANTS

ORDER GRANTING MOTION TO DISMISS

This case is before the court on motion of defendant Kmart Corporation to dismiss pursuant to Rule 12(b)(1) and Sections 1141 and 524 of the Bankruptcy Code and Article XII of Kmart Corporation's Plan of Reorganization ("the Plan") under Chapter 11 of the Bankruptcy Code, approved by the Bankruptcy Court on May 6, 2003. According to Kmart's motion, because plaintiff's action arose after the commencement of Kmart's bankruptcy case and because plaintiff failed to file an administrative expense request form as required by the Plan before the June 20, 2003 Bar Date, the plaintiff is barred from now asserting his claim against Kmart.

Plaintiff requested and was granted an extension of time until April 5, 2006 in which to file a response to Kmart's motion. To date, there has been no response filed. While the court has discretion to grant the motion on plaintiff's failure to respond alone, the undersigned has reviewed the motion and finds that it should be granted on the merits. *See* Uniform Local Rule 7.2(C)(2).

Upon due consideration of Kmart's motion and review of relevant case law, it appears that plaintiff's claim, for personal injury and product liability, falls within the category of administrative claims under the Bankruptcy Code. 11 U.S.C. § 503. As the plaintiff's claim has

yet to be adjudicated and is considered conjectural, it is considered to be “unknown” for purposes of publication and notice under the Bankruptcy Code. *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 371, 94 L. Ed. 865, 70 S. Ct. 652 (1950). Kmart properly published its notice of the Confirmation Order, Effective Date and Bar Date regarding its Plan in national publications as required by the Plan. The court finds that notice was properly provided to unknown claims such as that of the plaintiff. The plaintiff filed the instant action on July 1, 2005. As the plaintiff did not file an administrative expense request form prior to the Bar Date, the court concludes that the plaintiff’s claim against Kmart Corporation is properly denied, and Kmart’s motion to dismiss should be GRANTED.

SO ORDERED.

THIS, the 9th day of May, 2006.

/s/ S. ALLAN ALEXANDER
UNITED STATES MAGISTRATE JUDGE